IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 21 OF 2004

1. Mahesh Mehta Huf
   Residing at Shivam Vastu,
   Mezanine floor,
   Saroj Co-Op Hsg.Soc,
   Vidyanagar, Margao
   Goa 403 601.

2. Mahesh G. Mehta
   Karta of Mahesh G.
   Mehta Huf,
   Residing at Shivam Vastu,
   Mezanine floor,
   Saroj Co-Op Hsg.Soc,
   Vidyanagar, Margao
   Goa 403 601.
   Presently lodged at
   Sub Jail, Sada at
   Vasco Da Gama. ... Applicants

versus

1. State of Goa
   Through the Public Prosecutor.

2. Margarida Miranda
   Wife of Dr.Antonio de Miranda,
   Major in age,
   Residing at House No.561,
   Orgao-Ward, Loutolim,
   Salcete-Goa. ... Respondents

Miss Amira Razak, Advocate for the Applicants.

Mr. S. N. Sardessai, Public Prosecutor for the Respondent No.1.

Mr. C. Mascarenhas, Advocate for the Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 22ND NOVEMBER, 2005.

ORAL JUDGMENT

This revision is filed by the accused in C.C. No.101/N/2000/C against his conviction and sentence imposed upon him under Section 138 of the Negotiable Instruments Act, 1881(Act, for short), by Judgment/Order dated 18-6-2003 as confirmed by the learned 1st Additional Sessions Judge, Margao by his Judgment/Order dated 10-9-2004.

2. The case of the Complainant, in brief, is that the Complainant had invested money with the accused and in payment thereof the accused had issued two cheques both dated 30-9-1999, one bearing No.062165 for Rs.12,000/- and the other bearing No.062168 for Rs.4,00,000/-, both drawn on Global Trust Bank Ltd., Margao but when the Complainant presented the said cheques for encashment through her Bankers the same were dishonoured as the accused did not have sufficient funds in his said account and the said Bank had issued two different Memos to the

Complainant informing the Complainant that the cheques were dishonoured for the the following reason:

"Refer to drawer"

3. The Complainant issued a legal notice dated 10-1-2000 by registered post A.D. and the same was returned undelivered as the accused despite intimation by postal authorities declined and neglected to collect the said letter from the Post Office and, therefore, the accused was deemed to have been served with the notice and, although 15 days had expired, the accused did not pay the amount to the Complainant and thereby the accused had committed the said offence punishable under Section 138 of the Act.

4. The Complainant produced the said cheques along with the different Memos issued by Global Trust Bank as well as a copy of the Notice dated 10-1-2000 along with the returned postal article. The Complainant also examined a Bank Officer, namely, PW2/Virendra Acharya from the said Global Trust Bank. When the accused was questioned in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973(Code, for short), the accused gave rather evasive replies. Particularly it may be stated that when the accused was told that the Complainant in her evidence

had stated that she had invested with him Rs.4.12 lakhs, and he had paid the said money by issuing two cheques dated 30-9-1999 drawn on Global Trust Bank in the sum of Rs.4,00,000/- and Rs.12,00,000/- respectively as dues payable to her upto 30-9-1999, the accused replied that he knew nothing about it. The accused examined himself as his own witness and admitted having issued the said cheques to the Complainant in his own handwriting and for the first time stated that the said cheques were issued by him by way of a loan as the Complainant's daughter was getting married and she required money for that purpose. Such a plea was not taken by the accused either in cross-examination of the Complainant or for that matter in his statement recorded under Section 313 of the Code wherein in addition to what I have noticed, the accused had also stated that as far as the transaction was concerned, he did not deal with the Complainant but with Selma(who admittedly is the niece of the Complainant) and David.

5. The learned trial Court after considering the evidence produced by the Complainant came to the conclusion that the accused had issued both the cheques to the Complainant in discharge of his liability and both the said cheques were dishonoured on account of insufficiency of the amount in the account of the accused with the said Global Trust Bank. The learned trial Court also came to the conclusion that the Complainant had

issued a legal notice which was required to be presumed to have been received by the accused and as the accused failed to comply with the said notice within the time stipulated, the offence was committed.

6. The learned Additional Sessions Judge also considered the various aspects raised before him and came to the conclusion that the Judgment of the trial Court was in accordance with settled principles of law based on correct appreciation of evidence and, therefore, was required not to be interfered with.

7. After the filing of the present revision, the execution of the sentence imposed upon the accused was suspended upon the accused depositing an amount of Rs.50,000/- being part of the compensation ordered to be paid. The accused also deposited a sum of Rs.20,000/- in lieu of bail. This revision application was adjourned umpteen times at the request of both the parties to enable them to arrive at a compromise but since no compromise could be arrived at this revision application was ordered to be heard on 14-11-2005, on merits.

8. At the hearing of this revision application, learned Counsel Ms. Razak appearing on behalf of the accused has submitted that at the

relevant time when the Complainant had presented the cheques for payment the account of the accused with Global Trust Bank was frozen by the Investigating Officer in Crime No.79/99 under Sections 406 and 420 I.P.C. and the said Order was confirmed by the learned J.M.F.C. by Order dated 12-9-1999. It is further submitted by Ms. Razak that with the freezing of the said amount the cheques issued by the accused were also frozen and, therefore, the same could not have been honoured by the Global Trust Bank. Along with the revision application and to substantiate the submission made on behalf of the accused, letter dated 3-8-1999 addressed to the Chief Judicial Magistrate by the said Investigating Officer, Order dated 6-8-1999 of the Chief Judicial Magistrate, Margao, letter dated 27-8-1999 of the Investigating Officer addressed to the Chief Judicial Magistrate and the Order passed thereon dated 12-9-1999 of the learned J.M.F.C., Margao have been produced.

9. On the other hand, Mr. C. Mascarenhas, the learned Counsel on behalf of the Complainant has submitted that the accused cannot be allowed to produce for the first time before the revisional Court records which were not produced before the trial Court since the revisional jurisdiction of this Court under Section 397 of the Code is to only examine

the records of the proceedings of the trial Court as contemplated by sub-section(1) of Section 397 of the Code.

10. It has been submitted by Ms. Razak that the documents produced by the accused, and referred to herein above, are public documents and, therefore, the same can be looked into by this Court.

11. In turn, Mr. Mascarenhas has submitted that the said documents even if looked into, do not show that the account of the accused with the Global Trust Bank was indeed frozen and in case they were produced by the accused before the trial Court then the Complainant would have had an opportunity to prove that the said documents did not in fact relate to Account No.2602101160 of the accused with the Global Trust Bank.

12. In my view, the submission made on behalf of the accused by the learned Counsel Ms. Razak cannot be accepted. Whether the account of the accused was indeed frozen or not first by the Police Inspector by letter dated 4-8-1999 and then confirmed by Order dated 12-9-1999 is a plea which ought to have been raised by the accused before the learned trial Court and having not raised the same, the said plea which is a plea of fact

and not of law cannot be gone into for the first time in revisional jurisdiction since this jurisdiction itself is limited to examining the records and proceedings and verifying the correctness, propriety or legality thereof. That apart, the evidence of PW2/Acharya is quite clear on this aspect wherein he categorically stated that the cheques issued by the accused were dishonoured owing to insufficiency of funds. It appears that a faint attempt was made to cross-examine PW2/Acharya on that aspect and PW2/Acharya had stated that he did not know whether at the time of presentation of the cheques the account of the accused was sealed in view of the Order of the Court. Nothing had prevented the accused from producing the documents now sought to be produced, to PW2/Acharya and prove that indeed the said account with Global Trust Bank was sealed and, therefore, the cheques were dishonoured. The accused had another opportunity to produce the said documents in his statement recorded under Section 313 of the Code as well as when the accused stepped in the witness box to give evidence. The accused also did not produce the said documents at that stage. There is no dispute that the letter dated 4-8-1999 addressed by the Investigating Officer to the Branch Manager has made a request to him to freeze inter alia the account of Mahesh Mehta, Director of Investech Finance Goa Ltd. and its sister concern H.U.F. etc. However, from this letter it is not possible to gather whether the request of the said Investigating Officer dated 4-8-1999

was acceeded to by the Branch Manager of Global Trust Bank, Margao and the said Account bearing No.2602101160 was indeed frozen. Mr. Mascarenhas also points out that there is nothing to suggest at present that even the said letter dated 4-8-1999 was served upon the Branch Manager. It is safe to infer that in case the said letter dated 4-8-1999 was served on the Branch Manager and the Branch Manager had acceeded to the request of the Investigating Officer that PW2/Archarya would have certainly known about the same. The Order dated 6-8-1999 of the Chief Judicial Magistrate, Margao refers to the accounts of the accused in Centurion Bank, Margao as well as in Ratnakar Bank, Margao and not to the Global Trust Bank. Again, the letter dated 27-8-1999 of the Investigating Officer although refers to Account No.2602101160 and a request having been made to Ratnakar Bank Ltd. and Centurion Bank Ltd. to freeze the accounts, it makes no mention to any account in Global Trust Bank. The Order dated 12-9-1999 is also not explicit in confirming the earlier action of the Investigating Officer. In other words, a perusal of the aforesaid documents does not lead one to the conclusion that Account No.2602101160 of the accused in Global Trust Bank was first freezed by the Investigating Officer and then confirmed by the J.M.F.C., Margao, by his Order dated 12-9-1999. In this situation, the submission that the accused could not honour the said cheques because the account was frozen cannot

be accepted firstly, because it was not raised by the accused in the trial of the case and even otherwise the documents also do not show that the said account had at all been frozen. Nevertheless, it is to be noted that it is not the return of the cheques dishonoured simpliciter that creates an offence under Section 138 of the Act. The offence gets completed only after the notice is served and the payment as required by notice is not made. Therefore, for any reason, the cheques issued by the accused had remained unpaid, the accused was always free to pay the amount due on the said cheques demanded by the Complainant pursuant to the said letter dated 10-1-2000 and acquit himself from the liability of having issued the said cheques which were returned dishonoured for want of insufficient funds.

13. Ms. Razak on behalf of the accused has next submitted that the Complainant herself did not know what was the amount payable by the accused and, therefore, the presumption under Section 138 of the Act would not operate against the accused.

14. On the other hand, Mr. Mascarenhas has submitted it is not permissible for this Court in revisional jurisdiction to re-appreciate the entire evidence as if it is a second appeal and in this context, Mr. Mascarenhas has placed reliance on the case of **State of Maharashtra** v.

J**agmohan Singh Kuldip Singh Anand and others** (2004 AIR SCW 4767). There has not been a serious dispute as far as the issuance of the said two cheques by the accused to the Complainant. I have already referred to relevant answers given by the accused when the accused was examined under Section 313 of the Code and the said answers could certainly be construed as implied admissions that the Complainant had invested a sum of Rs.4.12 lakhs and the said cheques were issued by the accused to the Complainant towards the dues owed by the accused to the Complainant as on 30-9-1999. In fact, it appears that the Complainant reposed too much trust in the accused and this can be gathered from the fact that the Complainant even admitted in her evidence that it is the accused who had informed her that the accused had owed to the Complainant a sum of Rs.4.12 lakhs and that was after some payment was made by the accused to the Complainant when she was in the hospital due to her attack. If at all the Complainant did not remember what was the total amount of money invested by her with the accused, it is possibly because of her old age or because admittedly the investments on behalf of the Complainant were made with the accused through her niece, the said Selma. A cheque carries with it presumptions under Section 138 as well as Section 139 of the Act. Considering the totality of the facts stated on behalf of the Complainant it could not be said that the accused had displaced the said presumptions in

any manner. Both the Courts below have rightly believed the version of the Complainant that the said cheques were indeed issued by the accused in repayment of the money invested by the Complainant with the accused and, therefore, in my view, there is no further scope to interfere with the said findings in revisional jurisdiction.

15. The trial Court has sentenced the accused under Section 138 of the Act to undergo S.I. for a period of 15 days and in terms of Section 357 (3) of the Code has directed the accused to pay compensation of Rs.50,000/-. As already stated, the said compensation has been deposited by the accused before this Court.

16. Ms. Razak, the learned Counsel of the accused submits that out of the said S.I. of 15 days the accused has already undergone a period of 5 days after the accused was taken into custody pursuant to the orders of the learned Additional Sessions Judge and considering the facts of the case this would be a fit case to reduce the sentence to the said period of 5 days undergone by the accused. However, Mr. Mascarenhas, the learned Counsel of the Complainant submits that 15 days S.I. imposed by the learned J.M.F.C. was in fact inadequate and, therefore, no further interference is called for with the substantive sentence imposed upon the accused.

Mr. Mascarenhas has further submitted that the Complainant is an old lady and now of about 76 years of age and who was looking forward to live the rest of her life on interest which the accused would pay to her but now has lost the principal as well as interest and, therefore, on facts no case for further reduction of sentence is made.

17. As already seen the amount involved is Rs.4.12 lakhs and till date all that the Complainant has been able to receive is a sum of Rs.30,000/- which was paid to the Complainant during the talks for compromise while this revision was pending before this Court. The learned Counsel Ms. Razak submits that the Complainant has also obtained a decree from the Civil Court in the sum of Rs.4.12 lakhs and execution of the said decree is pending and this is yet another reason why the period of 5 days undergone by the accused should be treated as adequate sentence imposed by the accused.

18. Admittedly, post dated cheques dated 30-9-1999 were given to the Complainant in June of that year and till date the Complainant has not received her dues except for the said sum of Rs.30,000/-. Considering the amounts of the cheques namely, Rs.4.12 lakhs substantive sentence of 5 days would look like a flee bite sentence. In my view, considering the said

amount of Rs.4.12 lakhs substantive sentence of 15 days S.I. could also not be considered to be inadequate and considering the same in my view, there is absolutely no scope for further reduction of the said sentence.

19. Consequently, I find there is no merit in this revision and the same is hereby dismissed. The sum of Rs.50,000/- deposited by the accused before this Court shall be paid to the Complainant/Respondent No.2. Likewise, the sum of Rs.20,000/- deposited by the accused in lieu of bail shall also be paid to the Complainant. The accused to surrender before the trial Court to undergo the balance period of imprisonment imposed.

N. A. BRITTO, J.

RD.